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No. 90-255

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY and
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

v.

JOSEPH CAHILL and
ROBERT ABRAMS, ATTORNEY GENERAL OF THE
STATE OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari
To the New York Court of Appeals

BRIEF OF UNITED WAY OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION

WILLIAM H. ALLEN
PATRICIA A. BARALD
Counsel of Record
JOHN Y. GOTANDA
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Amicus Curiae
United Way of America

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United Way of America, with the consent of the parties, submits this brief amicus curiae in support of the petition in this case.

INTEREST OF THE AMICUS CURIAE

United Way of America is a national nonprofit charitable organization with nearly 1,300 member United Ways throughout the nation, including 53 in the State of New York. These member United Ways are the familiar vehicles for much of our country's charitable giving. Deriving their resources typically from annual community campaigns addressed to both individuals and companies, they use the resources thus collected to support

or contribute to the support of more than 40,000 health and welfare agencies, which in turn serve the needs of countless human beings.

The United Ways receive substantial charitable contributions from corporations, among them telephone companies, gas and electric companies, transportation companies and other utilities that provide citizens with necessary services. In 1989, corporate contributions to United Ways totaled $682 million, and of these the contributions from utility companies were $55.8 million. The petitioner New York Telephone Company contributed $2.1 million to United Ways in its service area, and United Ways in New York State received a total of $7.5 million from utilities. These contributions from utilities and their use to meet human welfare needs are jeopardized by the decision of the New York Court of Appeals.

ARGUMENT

Introduction and Summary

The decision below, that the First Amendment effectively prevents a regulated privately owned utility from including reasonable charitable contributions in the costs it can recover from its customers, raises substantial constitutional issues of large importance. By this brief the amicus United Way of America seeks to underscore the substantiality of the issues and their importance to the charitable activities of the 1,300 United Ways. If the decision of the New York Court of Appeals is allowed to stand without review by this Court, the 53 New York State United Ways and the health and welfare agencies they support stand immediately to be deprived of important corporate contributions, and contributions from utilities to United Ways in other states will be at risk.

The constitutional issues are indeed substantial. The court of appeals held that the decision of the petitioner New York Telephone Company to contribute to local charities from telephone user revenues is an action of the

State of New York because the New York Public Service Commission, exercising its regulatory authority over telephone rates, declined to veto the decision. That holding cannot be reconciled with this Court's decisions as to what is and what is not "state action" subject to constitutional strictures. The court of appeals held further that the respondent Cahill has a constitutional right derived from the First Amendment to prevent the petitioner telephone company from contributing to local charities because he disapproves of some of the recipient charities. That holding draws no support from and is at odds with this Court's decisions that the First Amendment protects an involuntary member of a state-supported organization from being associated with causes of the organization that are not his or her causes.

In combination, the court of appeals' two erroneous holdings threaten severe consequences for the amicus, its member United Ways and the agencies they support, and ultimately the people who benefit from the services of those agencies.

Reasons for Granting the Writ

1. A government-regulated but privately owned company is not, without more, the government or the state for the purposes of asserting constitutional rights against it. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 553 (1980) (Blackmun, J., dissenting); *Carlin Communication, Inc.* v. *Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357 (11th Cir. 1986). *See also Shelly* v. *Kraemer*, 334 U.S. 1, 13 (1948); *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976). Neither the monopoly status of a privately owned utility, nor the fact that it provides an essential public service, nor its subjection to detailed regulation in the public interest makes it the government for purposes of constitutional guarantees. So this Court ruled in the *Jackson* case. 419 U.S. at 350-54.

In that case, the Court held that actions of private entities are "state action" only when there is a "sufficiently

close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. It found no such nexus in the case at hand. There is no such nexus here. The Court noted in *Jackson* that it is in the nature of government regulation that a utility often has to seek "approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body." *Id.* at 357. The Court said that "[a]pproval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" *Id.* The rule thus stated could scarcely be clearer. In *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982), the Court put the same thought in slightly different terms. It said that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

There has been no exercise of coercive power or even significant encouragement here. The New York Public Service Commission "has not put its own weight on the side of" allowing recovery of charitable contributions from user revenues "by ordering it." The policy of the commission is merely to permit a utility that so chooses to initiate a normal business practice that a less regulated business would be free to institute without approval. The Public Service Commission neither compels nor encourages utilities to contribute to charities. The Public Service Commission plays no role in (1) a utility's decision whether to make any charitable contributions, (2) its determination of which charities to support, or (3) the amount that a particular recipient may receive (subject to the Commission's limit on total contributions). On those issues, the utility deals solely and directly with

the charities it supports. The relationship between a charity such as a member United Way and a publicly regulated but privately owned utility is thus no different from the relationship between a United Way and any other private corporate donor. Dissenting from his court's state action decision, Judge Titone aptly explained below that the commission "has done no more than merely refuse to interfere with what is essentially a private decision." (Pet. App. A42.)

New York Telephone's decision to contribute to organizations such as the United Ways in its service area, which provide such human care services as drug rehabilitation programs, home health care for the aged and handicapped, day-care, counseling and recreational programs to its employees, ratepayers, and others, is no different from the decisions made by thousands of other private businesses to further the welfare of the communities in which they operate. And New York Telephone's civic responsibility to the communities it serves and interest in their welfare is no less.

Many (though not all) state regulatory authorities (see Pet. 2-3 & nn.1, 3) have recognized that charitable contributions are expenditures that benefit utilities, their employees, ratepayers and the communities in which they do business and have therefore permitted such contributions to be included in the costs a utility is allowed to recover from its customers. *See, e.g., United Transit Co.* v. *Nunes*, 99 R.I. 501, 513-14, 209 A.2d 215, 222 (1965); *Southwestern Bell Tel. Co.* v. *State Corp. Comm'n*, 192 Kan. 39, 73, 386 P.2d 515, 544-45 (1963); *Application of Diamond State Tel. Co.*, 51 Del. 525, 536, 149 A.2d 324, 331 (1959); *Board of Supervisors* v. *Virginia Elec. & Power Co.*, 196 Va. 1102, 1118, 87 S.E.2d 139, 149 (1955). Federal authorities regulating telecommunications and natural gas utilities have similarly determined that charitable contributions are a legitimate business expense that may be included in the cost of

service for which a utility company's ratepayers are charged. In *In re Rules to Prescribe Components of Rate Base and Net Income*, 3 F.C.C. Rec. 269, 280 (1987) the Federal Communications Commission said that "reasonable charitable contributions are very much an obligation of [a] business enterprise to the community it serves and upon which it is dependent for its revenues" and are "part of the cost of doing business." The Federal Power Commission, predecessor to the present Federal Energy Regulatory Commission, ruled similarly. "Reasonable charitable contributions are very much an obligation of a business enterprise" and "are properly a cost of service." *In re El Paso Natural Gas Co.*, 46 F.P.C. 454, 467 (1971).

It has not heretofore been suggested that the cases just sampled turned the business decisions of utilities to contribute to meet human needs in their communities into decisions of state or federal government. However, for reasons that are altogether obscure, the New York Court of Appeals, dealing with just such a case—a case involving noncoerced conduct of a utility, to which this Court's decision in *Jackson* is squarely relevant—turned to the Court's inapposite decision in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), for guidance on whether there was state action in this case. (Pet. App. A31.) *Abood* is not even a "state action" case, let alone a case involving a utility and a regulatory commission declining to exercise a veto power. *Abood* concerned public employees and their union. Nonunion employees filed an action objecting to uses by the union of their service fees, which they were required to pay by an agency shop agreement between the union and the Detroit Board of Education, a government entity. Because the fees thus were required by an agreement between the union of government employees and the government employer, and the requirement was enforced by the employer, state involvement was obvious. As a result, it was unnecessary for the Court to address the state action issue. Certainly

there is nothing in the Court's opinion in *Abood* that suggests any modification of the clear rule of *Jackson*.

In short, the Public Service Commission's decision to allow but not require private utilities to recover charitable contributions from their rates merely permits those companies to engage in conduct clearly permissible for businesses not subject to rate regulation. Accordingly, the Public Service Commission's policy does not transform the private utilities' conduct into government action.

2. The court of appeals analogized the respondent Cahill to the Jehovah's Witness children who, this Court held in *West Virginia Bd. of Education* v. *Barnette*, 319 U.S. 624 (1943), could not be compelled to affirm what they did not believe; and to the Jehovah's Witnesses whom this Court in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), confirmed in their view that they could not be made to flaunt on their automobile a motto repugnant to their beliefs. (Pet. App. A3-A4.) The analogy is farfetched. Much more nearly is Mr. Cahill analogous to a taxpayer, who even though a Jehovah's Witness can be made to support by his taxes the cost of flying the flag over the Capitol and or of inscribing a motto on New Hampshire license plates, however antithetical the symbol of the flying flag or the motto may be to his profoundest tenets.

There are, to be sure, cases that might be thought closer in point—the cases that concern state compulsion to support a union, as in *Abood*, or, as in *Keller* v. *State Bar of California*, 110 S. Ct. 2228 (1990), the state's requirement that all California lawyers pay dues to their state bar. But what the Court has condemned in those cases as violative of the First Amendment is the coerced association of the dues payer with ideas or opinions advanced with the help of his dues that he finds unacceptable. No one would sensibly associate Mr. Cahill with New York Telephone's ideas or opinions just be-

cause he uses its services and pays his bills. In his capacity as customer he is much more nearly the taxpayer than he is the dues-paying member. Thus, even if the state action hurdle were mounted, there would be no First Amendment violation in this case.

3. There would be no such violation even if the connection between charitable contributions and any of the rights of expression and association guaranteed by the First Amendment were less attenuated than it is. Both New York law and the Public Service Commission's accounting regulations preclude recovery from user charges of any political or ideological expenditures. *Consolidated Edison*, 447 U.S. at 550. (Blackmun, J., dissenting). *See* New York Pub. Serv. Law § 114-a. Charitable contributions are made to assuage human needs; they are not within the cited prohibition. The court below acknowledged some of the benefits to utilities of making charitable contributions but denigrated them as resulting only in "gossamer civic goodwill" and as "peripheral to the *service* interests of the ratepayers." (Pet. App. A9 (emphasis in original).)

To the contrary, charitable contributions by a utility are not calculated merely to generate "beneficial corporate public relations." *Id.* Rather, they are investments in local communities from which the utility, its employees, shareholders, and ratepayers receive both tangible and intangible benefits. Contributions to member United Ways support day-care programs and counseling services, which directly benefit, among others, the employees of the utility. United Ways also support job training and placement programs, which not only improve the work force in the community, but may, by making ratepayers more self-sufficient, help insure that utility bills are paid. Local fuel funds serve a similar purpose. In addition, charitable contributions to United Ways go to fund community mental health programs, cancer screening programs, public health and fitness education programs, and many other health services, which help re-

duce a utility's direct costs of providing medical care to its own employees. Furthermore, United Ways support programs providing community youth services, and address problems of homelessness, hunger, unemployment and alcoholism, which, by helping to reduce vandalism and urban blight, not only reduce the utility's maintenance and repair expenses, but also help make the community a more attractive place to live and work. This in turn improves the utility's ability to recruit and retain highly qualified personnel.

All of this is far from "gossamer." It is good business. Federal agencies, as we have seen, have characterized contributions to causes such as these as "an obligation of a business enterprise." At the very least, they are, as the New York Public Service Commission has recognized, a reasonable cost of doing business that can be recovered in rates. The commission's recognition of that fact and consequent declination to veto New York Telephone's business decision does not make that decision attributable to the state, and, if it did, there would nevertheless be no First Amendment violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ALLEN
PATRICIA A. BARALD
Counsel of Record
JOHN Y. GOTANDA
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Amicus Curiae
United Way of America

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